

SEAN KIM 1787-0
1188 BISHOP STREET, SUITE 1210
HONOLULU, HI 96813
Telephone: (808) 538-1812

Attorney for Petitioner International
Brotherhood of Electrical Workers,
Local 1186

UNITED STATE OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

In the Matter of:	)	Case No 20-RC-145340
)	
OCEANIC TIME WARNER CABLE	)	PETITIONER INTERNATIONAL
LLC,	)	BROTHERHOOD OF ELECTRICAL
	)	WORKERS, LOCAL 1186'S POST
Employer,	)	HEARING BRIEF RE CHALLENGED
	)	BALLOTS; CERTIFICATE OF SERVICE
and)	
)	
INTERNATIONAL BROTHERHOOD)	
OF ELECTRICAL WORKERS,)	
LOCAL 1186,)	
	)	Hearing: April 24, 2015
Petitioner.	)	Hearing Officer: Trent K. Kakuda

**PETITIONER INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 1186'S POST HEARING BRIEF RE CHALLENGED
BALLOTS**

I. INTRODUCTION

This matter came on for hearing to resolve the challenges to the votes cast by Cora Bush ("Bush") and Charles Peterson ("Peterson") in the representation election held on March 12, 2015. It is the position of the International Brotherhood of Electrical

Workers, Local 1186 (“Petitioner” or “Local 1186”) that Ms. Bush’s ballot should not be counted since she is not within the stipulated unit for the election. It is the position of Petitioner that Mr. Peterson’s ballot should be counted since he is within the stipulated unit for the election.

II. RELEVANT FACTS

1. Stipulated Election Agreement.

The election held at the Kailua-Kona facility of Oceanic Time Warner (“Employer” or “Oceanic”) was held pursuant to a Stipulated Election Agreement. See Board Ex. 1(b). The Stipulated Election Agreement stated that the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b):

Included: All production and maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication industry based at the Employer’s Kailua-Kona facility.

Excluded: Office clerical employees, professional employees, guards, watchmen and supervisors as defined by the Act.

Id.

Mr. Peter Akamu, the Petitioner’s President and Assistant Business Manager, testified that he prepared the petition that was filed in this matter. T at 79. He prepared the unit description in the Petition based on the current Blue Collar collective bargaining agreement (“CBA”) between Petitioner and the Employer. T at 79-80. The “Unit and Eligible Voters” in the Stipulated Election Agreement was based on the Oahu Blue Collar

CBA between the Petitioner and the Employer. T at 81. Mr. Akamu identified the classifications contained in the Oahu Blue Collar CBA. T at 82-83. The listed classifications are: Maintenance Technician, Service Technician, Service Installer, Warehouseman, CATV Lineman, Engineering Assistant, Field Design Engineer. T at 82-83; **see** Petitioner's Ex. 2 at 36-39. The Oahu Blue Collar CBA does not include the Dispatcher classification. T at 83.

Petitioner's Ex. 3 is the Maui Blue Collar CBA. The recognition section in the Maui Blue Collar CBA is identical to the Oahu Blue Collar CBA. T at 83; **compare** Petitioner's Ex. 2 at Section 1.01 with Petitioner's Ex. 3 at Section 1.01. The classifications covered under the Maui Blue Collar CBA are listed, starting at page 35. T at 83. There is no Field Engineer classification in the Maui Blue Collar CBA since he does not believe that there are any engineers working on the island of Maui. T at 84. The Dispatcher's position on Maui is not included in the Maui Blue Collar CBA. T at 85.

Petitioner's Ex. 4 is the Oahu White Collar CBA. T at 84. The Dispatcher classification, which is similar to the Kailua-Kona Dispatcher, is contained in the Oahu White Collar CBA. T at 84; **see** Petitioner's Ex. 4 at 34, Section 2, Group III.

Petitioner's Ex. 7 is the Maui White Collar CBA. T at 87. The Dispatcher classification is included in the Maui White Collar CBA at page 24. T at 87; **see** Petitioner's Ex. 7 at 24.

It was Mr. Akamu's understanding that the unit description in the Stipulated

Election Agreement would include all of the classification covered under the Oahu Blue Collar CBA. T at 84-85.

Mr. Akamu testified that he received a copy of a letter¹ sent by Mr. Ronald Leong, attorney for the Employer, to Regional Director Frankel. T at 85. He understood that Mr. Leong's law firm represented the Employer. T at 85.

Mr. Akamu testified that the initial Excelsior List prepared by the Employer did not include Ms. Bush, Mr. Peterson or the Warehousemen. T at 85-86; see Petitioner's Ex. 6. However, based on Mr. Leong's letter, the Employer included the Warehousemen² in a revised Excelsior List. T at 86; see Petitioner's Ex. 5 at 4. The revised Excelsior List submitted by the Employer continued to exclude Ms. Bush and Mr. Peterson. T at 86.

Mr. Akamu testified that the Union was not seeking a wall to wall unit. T at 93. When he wrote the petition, he used the terms "production" and "maintenance" to mean

¹ The letter expressed concerns about the inclusion of the Warehousemen classification and OSP Engineer. Mr. Leong stated, in pertinent part:

Oceanic understood and intended this provision [appropriate bargaining unit] to exclude warehousemen and the outside plant engineer based on, inter alia **the interpretation of the same language for IBEW's bargaining units at Oceanic on Oahu, Maui and Kauai Accordingly, Oceanic signed and entered into the Stipulated Election Agreement based on this understanding and intent** (Emphasis added.)

See Union Ex. 5 at 1.

² Mr. Jesse Lockwood and Mr William Silva. T at 86.

the employees who work in the field and handle the materials used in the field. T at 96.

The Employer offered no testimony regarding the parties' intent with respect to the unit description.

B. The Kailua-Kona Installers/Technicians.

Mr. Patrick Lucas is the Installation Supervisor at the Kailua-Kona facility. T at 13. He testified that he supervises the Installers and installing Technicians. T at 14. He schedules these employees and manages where the installers go; the areas they work in; and makes sure that they are equipped with their equipment. T at 14. He provides technical and safety training to these employees. T at 14. The Installers/Technicians install cable service, which includes standard service, video service, internet, phone, as well as, business class services. T at 14-15. Their primary job is to install and troubleshoot cable services. T at 36.

The Installers/Technicians work with hand tools: gutters, hammers, screwdrivers, wrenches, test equipment that measure signal quality and various meters like the bulk meter and multi-meter. T at 15. They are required to use signal meters, multi-meters, hand tools and safety equipment. T at 38. The Installers/Technicians are assigned vehicles that they take home and maintain. T at 15. A bucket truck is a lift truck and is used to reach cable service on poles or mid-span. T at 15. The Installers/Technicians typically start their workday FROM their home. T at 15. Three (3) days out of the week they start work directly from home. T at 15. Twice a week,

Tuesday and Thursday, they report to the office. T at 15-16. On Tuesday from 7:00 - 8:00, he meets with the Installers/Technicians to talk about updates to policies, technical changes and training. T at 16. On Tuesday and Thursday, the Installers/Technicians come to the office for half an hour to pick up their modems and cable boxes. T at 16. The Installers/ Technicians are required to have knowledge of electronics and installation. T at 37. They are required to carry equipment. T at 37. The physical requirements of the job require them to lift, carry and use tools. T at 38. They work outside the office in various weather conditions. T at 39.

If an Installer/Technician does not maintain the vehicle assigned to them, they are subject to disciplinary action. T at 38.

Before an Installer or Technician can work in these job classifications, they are required to undergo training. T at 40. This includes safety training on climbing poles, using a ladder and the maintenance of their equipment. T at 40.

At the Tuesday meeting, service and maintenance employees, the dispatcher and the warehouse employees are present. T at 16. This meeting is called the “field meeting.” T at 23. Safety items are reviewed. T at 23. They also discuss technical changes, channel lineups, frequency changes and changes to equipment. T at 23. Mr. Lucas testified that Ms. Bush is present since he views her as the liaison between the field employees and customer service employees since she has access to the billing system. T at 24.

Installers and installing Technicians report to Mr. Lucas. T at 60. Service and Maintenance technicians report to Mr. Matt Castillo, who is on the same organizational level as Mr. Lucas. T at 60.

C. The Kailua-Kona-Dispatcher, Ms. Bush.

Ms. Cora Bush is the Kailua-Kona Dispatcher. T at 17. She makes sure that work orders are given to specific technicians³. T at 17. During the course of the day, she makes sure that jobs are completed. She completes jobs or posts work orders in the billing system. T at 17. Ms. Bush also schedules employees⁴, **which is her main job as a Dispatcher**. T at 17. She makes sure that the schedule calendar is open in the billing system. T at 17. She maintains the scheduling calendar - which assists the Customer Service Representatives in speaking with customers. T at 17-18. Mr. Lucas testified that the office clerical employees are also involved in scheduling. T at 24. Ms. Bush answers questions from the field employees in the same manner as customer service representatives. T at 25.

Ms. Bush has daily contact with the Installers and Maintenance employees, but Installers call Mr. Lucas directly to tell him if he or she is not coming to work. T at 18.

³ It was not clear on the record how Ms. Bush “assigns work orders” since (a) the Installers/Technicians do not report to the office and (b) the Installers/Technicians receive their work order through the Work Assure program, which electronically sends the work order to their hand held devices. T at 22-23.

⁴ The Dispatcher is in charge of scheduling employees when someone is requesting vacation. T at 21.

Ms. Bush starts work at 6:30 a.m. and coordinates with Mr. Lucas to distribute work orders if a scheduled installer is not coming to work. T at 18, 34. Her normal working hours are 6:30 a.m. to 3:30 p.m. T at 34. The Installers/Technicians work from 7:00 a.m. to 4:00 p.m. T at 34.

The Installers speak to the Dispatcher if they have a work order with incorrect information. T at 19. The Installers would call the Dispatcher if the location of the work order is incorrect. T at 19. An Installer could call her to determine if another Installer is in the same work area in the event the Installer needs equipment. T at 19. If a job is running longer than expected, the Installer would call Ms. Bush to let her know to assign another Installer to the job. T at 20.

Ms. Bush has access to the Employer's billing system. T at 19.

There is only one (1) Dispatcher for Kailua-Kona. T at 20. Mr. Lucas initially testified that if Ms. Bush is not at work, he performs her job duties. T at 22. However, he subsequently testified that when Ms. Bush is not at work, she instructs the Installers/Technicians to contact the Dispatchers working in Oahu. T at 45-46. This would occur when she is taking part of the day off; when she is not working for the entire day; when she is out sick or when she is on vacation. T at 46. Mr. Lucas then testified that, if Ms. Bush is not at work, he would handle all routing until 8:30 a.m., when he hands it off to the Oahu Dispatchers. T at 55.

Ms. Bush informs Mr. Lucas when Installers/Technicians are not in the

appropriate location. T at 22. She checks with them to determine why they are not in the proper location. T at 22.

Mr. Lucas testified that the Installers/Technicians have tablets which dispatches work automatically. T at 22. There are no manual work orders for the Installers/Technicians. T at 23. Mr. Lucas also testified that the Business Class Installers receive written work orders. T at 57. The other work orders are done electronically. T at 56-57.

The Dispatcher is not engaged in the installation of any equipment. T at 36. The Dispatcher does not visit customer homes. T at 36. The Dispatcher is not required to have knowledge of electronics or installation. T at 37.

The Dispatcher does not do any driving as part of her work duties. T at 37. She does not carry any equipment. T at 37.

The Dispatcher's primary equipment is the computer, cell phone, telephone and city map. T at 37. The physical job requirements for the Dispatcher are primarily to sit, type, use the computer, and talk to the Installers/Technicians. T at 38. The Dispatcher does not undergo the same training as the Installers/Technicians. T at 41.

Mr. Lucas testified that the primary skill the Dispatcher has is typing and using the telephone. T at 36. She also has to know the skill level of the Installers/Technicians. T at 36. The Dispatcher has to know how to use a computer. T at 37. The Dispatcher works in the office. T at 39.

The Kailua-Kona Dispatcher falls in the Technical Operations department. T at

33. The Dispatcher reports to Mr. Lucas. T at 61.

Mr. Akamu testified that Dispatcher Bush performs similar job functions in talking to the field employees as the Dispatchers on Oahu, but the Oahu Dispatchers generally do not talk to the Installation Supervisor. T at 94. Mr. Akamu, upon being shown Petitioner's Ex. 9, testified that the Lead Dispatcher on Oahu reports to the Senior Maintenance Foreman and Director of Technical Operations. T at 112.

Mr. Akamu testified that he spoke to Oceanic's Director of HR about the warehouse employees and Mr. Peterson. T at 115. Ms. Taira never mentioned that Ms. Bush should be included on the eligibility list. T at 116.

D. Outside Plant Engineer, Mr. Peterson.

Mr. Robert Moeller is an Oceanic Engineer. T at 63-64. He works with Mr. Peterson. T at 63. He is training Mr. Peterson. T at 63. Mr. Moeller reports to Mr. Wayne Iokepa, who is in charge of engineering and construction. T at 49, 63. He works from the office. T at 63. He basically plans and designs Oceanic's cable system in Kailua-Kona. T at 63. When a new system is being built, he figures out what is needed to create it. T at 63. He basically works with a computer and calculator. T at 64.

Mr. Moeller testified that Mr. Peterson does the same thing as he does. T at 64. He testified that Mr. Peterson uses a computer. T at 65. Prior to being hired as the OSP Engineer, Mr. Peterson worked as a Customer Service Representative. T at 65.

Mr. Peterson does not climb poles. T at 66. But, Mr. Moeller has in the past. T

at 66. Mr. Moeller testified that Mr. Peterson does not work with installers. T at 66. Mr. Peterson does work in the field, doing field surveys, looking at infrastructures, poles and underground locations. T at 66.

Mr. Moeller testified that Mr. Peterson does not perform physical work in the field. T at 67. He is not involved in installation or maintenance. T at 67. However, if the installers or technicians run into a non-standard install, they refer the information to Mr. Peterson and a new design or plan is generated on how to hook the customer up. T at 68.

Mr. Moeller testified that Petitioner's Ex. 1 was similar to the position description for Mr. Peterson. T at 70. He testified that Mr. Peterson does most of the things listed in Petitioner's Ex. 1, but he does not perform physical work in the field. T at 71. He does not use meters or check signal levels. T at 71. But he does go out to the field to look at infrastructure and to determine what problems might arise. T at 71. He does not do any physical work since Oceanic hires outside contractors. T at 72.

Mr. Peterson is required to drive as part of his job duties. T at 73. He is assigned a vehicle and is required to maintain it. T at 43. He is subject to discipline if he fails to maintain the vehicle. T at 43-44. He uses a ladder as part of his job responsibilities. T at 54. He is required to carry a toner, which is used to mark Oceanic's underground lines. T at 73. He also uses a screwdriver. T at 73. Mr. Lucas and Mr. Moeller testified that Mr. Peterson is given a side cutter, prep tools and crimper. T at 47,

74. But, Mr. Moeller testified that Mr. Peterson does not use them. T at 74.

Outside plant means anything that has to do with Oceanic's trunk and distribution system. T at 76.

Mr. Lucas testified that Mr. Peterson puts in the orders to the warehouse for the parts to install cable in a subdivision. T at 26. Mr. Peterson would do "walk-outs," which is a survey of the job location; where the signal is coming from; how many outlets there are in a home; the path the cable would take. T at 27.

If there is a problem with the customer line from the tap location (where the customer's cable connects to), the installers make a drawing or a survey. T at 29. The installer would submit the drawing or survey to Mr. Moeller or Mr. Peterson. T at 29.

Mr. Peterson works the same hours as the installers and technicians. T at 34.

Mr. Akamu testified that the Field Engineer is a bargaining unit position under the Oahu Blue Collar CBA. T at 89. Petitioner's Ex. 8 is the job description for the Oahu Field Engineer. T at 99. The Field Engineer assists the field personnel on Oahu. T at 99.

Mr. Akamu testified that he believes the OSP Engineer is included in the unit since the OSP Engineer performs similar work to the Oahu Field Engineer. T at 100.

Mr. Akamu testified that he spoke with Ms. Marcia Taira, the Director of HR of Oceanic, about the omission of Mr. Peterson from the eligibility list. T at 114.

IV. ARGUMENT

It is the position of the Union that the parties' Stipulated Election Agreement

was intended to exclude the Dispatcher (Cora Bush) from the bargaining unit and included OSP Engineer (Charles Peterson) in the bargaining unit. Additionally, the Union argues that under the Board authority of **Speciality Healthcare**, 357 NLRB No. 83 (2011), in order for the Employer to expand the petitioned-for unit to include the Dispatcher, the Employer is required to show that the Dispatcher shares an “overwhelming” community of interest with the petitioned-for bargaining unit. The Employer cannot meet its burden of proof.

A. ANALYZING THE STIPULATED ELECTION AGREEMENT

The Stipulated Election agreement described the unit as:

Included: All production and maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication industry based at the Employer’s Kailua-Kona facility.

Excluded: Office clerical employees, professional employees, guards, watchmen and supervisors as defined by the Act.

See Board Ex. 1(b).

In **Caesar’s Tahoe**⁵, 337 NLRB 1096 (2002) the Board formally adopted a three (3) prong test⁶ for analyzing stipulations.

⁵ The discussion in this case regarding the difference between plant clerical and office clericals is not applicable to this proceeding. In fact, the Board has held that in the cable industry, the dispatcher should be included in the unit of customer service employees. See **St. Thomas-St. John Cable TV**, 309 NLRB 712 fn 2 (1992).

⁶ The test was articulated in **Milk Producers Inc. v. NLRB**, 193 F3d 539 (D.C.Cir. 1999).

The Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Id. at 1097.

B. THE STIPULATED ELECTION AGREEMENT IS UNAMBIGUOUS WITH RESPECT TO THE DISPATCHER AND PROBABLY AMBIGUOUS WITH RESPECT TO THE OSP ENGINEER BASED ON APPLICABLE BOARD AUTHORITY.

In **Cesar's Tahoe**, the Board found that since the express language of the stipulated election agreement neither specifically included or specifically excluded the classification in dispute (Engineering Coordinator), the parties' intent with regard to that position was unclear based solely on the language of the stipulation. **Id.** at 1098. The failure to list or exclude a disputed classification did not establish that the parties clearly intended to include or exclude the classification. **Id.** The Board also found that since there was no generic "all other employees" language in the stipulation, the stipulation could not be found to reflect the parties' intent to include or exclude the disputed classification. **Id.**

With respect to the challenged employee, the Board concluded that since the stipulation was facially ambiguous and the employee did not fall under an express

exclusion, the Board had to look at extrinsic evidence of the parties' intent. If this did not discern the parties' intent, then it would review it using the community of interest standard.

In **USF Reddaway, Inc.**, 349 NLRB 329, 330 (2007), the Board stated that it will find a clear intent to include those classifications that match and exclude those classifications that do not match the express language of the stipulated bargaining unit. Since the unit description did not match the actual classifications of the employer. In **USF**, the Board found that the language of the stipulation was ambiguous.

In the instant matter, while the terminology used in the stipulation does not match the Employer's classifications, Petitioner believes that the unit description is not ambiguous with respect to the Dispatcher Bush. The evidence is clear that the Dispatcher is not involved in the "construction, installation, maintenance **and** service in the Cable Communication industry." While the Dispatcher does have contact with the Installers and Technicians who report to Mr. Lucas, she is not involved in any activity related to "construction, installation, maintenance **and** service." The use of the word "and" makes it undisputedly clear that it was the parties' intent to exclude the Dispatcher from the stipulated unit. If the Hearing Officer rejects this argument, then the unit description is ambiguous and the next step in the analysis must be reviewed.

As to the OSP Engineer, Petitioner agrees that the stipulated unit description is ambiguous as to the parties' intent.

B. EXTRINSIC EVIDENCE OF THE PARTIES' INTENT.

Petitioner offered substantial extrinsic evidence of the parties' intent.

First, Mr. Akamu testified that it was Petitioner's intent to have the same classification that appeared in the Oahu Blue Collar CBA covered by the stipulated election agreement. Therefore, the terminology used to describe the unit is identical to the recognition language contained in the parties' Oahu and Maui Blue Collar CBAs.

Second, Petitioner presented the letter sent to the Regional Director by Oceanic's attorney which stated that "Oceanic understood and intended this provision to exclude the warehousemen and the outside plant engineer based on, inter alia, the **interpretation of the same language for IBEW's bargaining units at Oceanic on Oahu, Maui and Kauai . . .**" (Emphasis added.) See Petitioner's Ex. 5 at 2. Oceanic's attorney further stated that:

Accordingly, Oceanic signed and entered into the Stipulated Election Agreement **based on this understanding and intent . . .** (Emphasis added.) **Id.**

Similar to Mr. Akamu's testimony, Oceanic's attorney's letter clearly demonstrates that it was the parties' mutual intent to have the unit description interpreted in accordance with the parties existing CBAs on Oahu and Maui.

Third, Oceanic's attorney's argument on the exclusion of the warehouse employees and the OSP Engineer was based on the argument that the CBAs on the islands of Oahu, Maui and Kauai, and the Hilo facility did not include warehousemen or the OSP

engineer⁷. **See** Petitioner’s Ex. 5 at 1. The Employer prepared the revised Excelsior List to include the warehouse employees but continued to exclude the Dispatcher and OSP Engineer. This is further evidence of the parties’ intent.

1. The Parties Intended That The Dispatcher Classification Be Excluded.

Under the Oahu and Maui Blue Collar CBAs, the Dispatcher is not part of the bargaining unit of “production and maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication industry.” The Dispatcher classification⁸ is included in the parties’ Oahu and Maui White Collar CBAs, which covers Customer Service Representatives.

The initial Excelsior List provided by the Employer did not include the Dispatcher’s job classification. **See** Petitioner’s Ex. 5 at 4. This was in keeping with the intent as expressed by Mr. Akamu and Oceanic’s attorney. It is also consistent with the parties’ Oahu and Maui Blue Collar CBAs (excluding the Dispatcher) and Oahu and Maui White Collar CBAs (including the Dispatcher).

Consistent with the parties’ clear intent to exclude the Dispatcher, the revised Excelsior List provided by the Employer did not include the Dispatcher’s job classification. **See** Petitioner’s Ex. 6.

⁷ The warehousemen were subsequently included on the revised Excelsior List. They are covered by the Oahu and Maui Blue Collar CBAs.

⁸ The Employer offered no evidence to contradict Mr. Akamu’s testimony that the job duties performed by the Oahu and Maui Dispatchers was similar to the Kailua-Kona Dispatcher.

Finally, Mr. Akamu testified that he spoke with Oceanic's Director of HR, Ms. Marcia Taira. At no time did Ms. Taira contend that the Dispatcher should be included in the stipulated unit.

Petitioner submits that it has presented clear extrinsic evidence of the parties' intent. It was express by words used by the parties (Mr. Akamu's testimony and Oceanic's attorney's letter). The conduct of the parties (the Excelsior Lists). And the lack of any dispute by Oceanic prior to the election (Ms. Taira never mentioning the Dispatcher's classification⁹).

Based on this clear evidence, the Dispatcher's position must be excluded. Ms. Bush's challenged ballot cannot be counted.

2. The Parties Intended That The OSP Engineer Classification Be Included.

Petitioner also submits that based on the parties' intent, the OSP Engineer, Mr. Peterson, should be included in the unit. While his job title may be different (OSP versus Field Engineer), a comparison of Petitioner's Ex. 1 and 8 makes it clear that he performs similar duties and functions as the Field Engineer, a position included in the Oahu Blue Collar CBA.

A comparison of the essential functions of the Field Engineer's job description (Petitioner's Ex. 8) with Petitioner's Ex. 1 makes it clear that the difference between the

⁹ Counsel for Oceanic made an argument that Ms. Bush was not included on the Excelsior List due to some inadvertent mistake by Oceanic. This is not evidence and should not be considered by the Hearing Officer.

Field Engineer and the OSP Engineer is simply the job title. The Field Engineer and OSP Engineer both do walkouts. The Field Engineer and OSP Engineer prepare and receive all contractor bids and maintain a working relationship with contractors. The Field Engineer and OSP Engineer work with various entities concerning new facilities or new projects and homes. They both do cost estimates. They both only need a high school diploma or its equivalent. They both must have experience with plan construction, contracting practices and accounting principles. The special skills, knowledge and abilities are similar between the two (2) positions.

It is true that, unlike the Dispatcher classification, the Employer did file a pre-election statement that it did not intend to include the OSP Engineer in the unit description. *See* Er. Ex. 5. However, Petitioner submits that since it is clear that the parties' intended that the stipulated unit description applied to the classifications contained in the Oahu Blue Collar CBA, the OSP Engineer should be included in the unit. Mr. Peterson's vote should be counted.

C. COMMUNITY OF INTEREST TEST.

If the Hearing Officer determines that there was insufficient extrinsic evidence to exclude the Dispatcher or include the OSP Engineer then the community-of-interest test must be applied to both positions.

Petitioner submits that the starting point for this analysis is **Specialty Healthcare**, 357 NLRB No. 83 (2011). In **Specialty Healthcare**, the Board recognized

that the petitioner's desire concerning the unit "is always a relevant consideration." **Id.** at

8. The Board stated:

As the Board recently explained, "the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends." *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2 (2010).

Petitioner clearly intended to have a unit consistent with the collective bargaining agreements with Oceanic on Oahu and Maui. The evidence is clear that the Installers/Technicians share a community-of-interest. They perform the same or similar work installing and maintaining the Employer's cable products and system. They are assigned and work with the same tools. They are required to have a valid driver's licenses and are required to maintain, at the threat of discipline, the vehicles assigned to them. They undergo specialized training relating to installation and maintenance. They work primarily outside of the office, and usually start work from their homes. They are only at the office for 1-1/2 hours per week. The remainder of the time they are working outside of the Employer's office. They are required to be able to carry and lift. They use ladders as part of their daily work responsibilities. There is no question that the Installers and Technicians share a community of interest¹⁰. Therefore, under **Speciality Healthcare**, Petitioner's stated unit of Installers and Technicians was an appropriate bargaining unit.

¹⁰ The warehousemen were included by the Employer and Petitioner. There was no challenge raised as to their eligibility to vote or their community-of-interest with the Installers and Technicians.

1. **Ms. Bush Does Not Have An Overwhelming Community Of Interest With The Installers and Dispatchers.**

To this clearly appropriate unit of Installers and Technicians, the Employer seeks to expand the unit by adding the Dispatcher's position. However, **Specialty Healthcare** stands for the proposition that even if her inclusion could be appropriate, it will not be ordered unless the Employer can meet its burden to show that the Dispatcher shares an overwhelming community of interest with the Installers and Technicians. **Id.** at 11.

In **DTG Operations, Inc.**, 357 NLRB No. 175 (2011), the Board reviewed whether certain employees shared an overwhelming community of interest with the petitioned-for unit. The Board found that there was no "overwhelming" community of interest. The Board stated **supra** at 5:

We nonetheless reverse the Regional Director's finding. Because the RSAs/LSRAs **work separately** from other employees and **perform distinct sales tasks** with **distinct qualification, distinct expectations, and distinct consequences** for the failure to meet those expectations, we conclude, as explained below, that the record evidence does not demonstrate that RSAs/LSRAs share an overwhelming community of interest with other hourly employees.

In **DTG**, the petitioned-for unit worked in different locations. **Id.** at 5-6. They had distinct job functions. **Id.** at 6. They had specific training. They participated in a punitive incentive program. There was no interchange between these employees and

other hourly employees. Because of these factors, the Board held that the petitioned-for unit did not include the other hourly employees.

Similarly in **Grace Industries, LLC**, 358 NLRB No. 62 (2012), the Board found that the petitioned-for unit was appropriate even though the work involved by the excluded employees was not totally distinct. The Board found that since the petitioned-for unit employees had distinct skills and functions; distinct interests in wages and working conditions; and used distinct tools, the unit was appropriate if it excluded employees who had some degree of overlap, interchangeability and contact. **Id.** at 5.

The evidence presented at the hearing clearly shows that Dispatcher Bush does not share an overwhelming community of interest with the Installers and Technicians.

1. Ms. Bush works in the office. The Installers and Technicians work in the field. The Installers and Technicians are at the office for 1-1/2 hours per week. Ms. Bush is at the office her entire work day.

2. Ms. Bush is not assigned a vehicle. The Installers and Technicians are assigned and required to maintain their vehicles, with discipline imposed if they do not.

3. Ms. Bush only works with a computer, cell phone, telephone and city map. The Installers and Technicians work with tools - signal meters, multi-meters, hand tools, ladders and safety equipment.

4. Ms. Bush starts her day at 6:30 a.m. and ends at 3:30 p.m. at the Employer's office. The Installers and Technicians start work from home three (3) days

out of the week. They start at 7:00 a.m. and their day ends at 4:00 p.m.

5. Ms. Bush, when she is not at work, is replaced by Dispatchers located on the island of Oahu after 8:30 in the morning. There was no evidence presented that the Installers and Technicians work with or are interchanged with the Installers and Technicians from the islands of Oahu, Maui, Kauai and the Employer's Hilo location. There was no evidence that Ms. Bush performs the work of the Installers and Technicians or the Installers and Technicians perform Ms. Bush's work.

6. Ms. Bush was not trained to perform the same work performed by the Installers and Technicians. They are required to be knowledgeable about electronic and installation. Ms. Bush does not have this training or knowledge.

7. Ms. Bush does not perform any physical work. The Installers and Technicians are required to carry and lift their equipment.

8. Ms. Bush schedules the Installers and Technicians. This is her primary job function. The Installers and Technicians do not perform this work.

9. Ms. Bush has access to and maintains the scheduling calendar. There was no evidence that the Installers and Technicians have similar access or are involved in scheduling or maintaining the scheduling calendar.

10. Ms. Bush has access to the Company's billing system. There was no evidence presented that the Installers or Technicians have access to the Company's billing system. In fact, the evidence indicates that they do not since they have to call Ms. Bush to

obtain information from the billing system.

The evidence presented at the hearing clearly demonstrates that Dispatcher Bush does not have an overwhelming community of interest with the Installers and Technicians. The Employer failed to meet its burden of proof. As a Dispatcher she is more appropriately included in a unit with the Customer Service Representatives. **St. Thomas-St. John Cable TV, supra.**

Specialty Healthcare requires that the classifications that the employer wants to include in the unit must “overlap almost completely.” See **Specialty Healthcare, supra** at 11. The evidence is clear that there is very little overlap between the Dispatcher and the Installers/Technicians.

The Board’s decision in **Caesar’s Tahoe, supra**, does not require a different result. In **Caesar’s Tahoe**, the union was claiming that the employee fell within the petitioned-for unit. The union was asking for a larger unit that included the Engineering Coordinator. In this matter, Petitioner is seeking a smaller unit that does not include the Dispatcher. Ms. Bush has a greater community of interest with the Dispatchers on Oahu, who replace her, than she does with the Installers and Technicians in Kailua-Kona. Ms. Bush should be excluded from the petitioned-for unit since she does not share an overwhelming community of interest of the unit sought by Petitioner.

2. Mr. Peterson Has a Community Of Interest With The Installers And Technicians.

Mr. Peterson, on the other hand, shares a community of interest with the

installers and technicians since he also works in the field. Petitioner acknowledges that he is supervised by Mr. Moeller and not Mr. Lucas. Petitioner acknowledges that the evidence presented at the hearing indicates that he does not work with directly Installers and Technicians. Petitioner acknowledges that he does not work with tools. However, Mr. Peterson is directly involved in laying out the work that the Installers and Technicians may perform. He does “walk-outs” with the installers. He is assigned a company vehicle and is subject to the same disciplinary action for failure to maintain the vehicle.

Mr. Peterson’s title of OSP Engineer is simply a title. He performs many of the same functions as the Field Engineer, whom the parties have acknowledged has a community of interest with Installers and Technicians on the island of Oahu.

Petitioner submits that Mr. Peterson should be included in the unit and the challenge to this ballot must be overruled.

V. CONCLUSION

For the reasons set forth herein, Petitioner submits that Ms. Bush is excluded from the stipulated unit and Mr. Peterson should be included.

Dated: Honolulu, Hawaii, May 1, 2015.

/s/ SEAN KIM
Attorney for Petitioner

UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

In the Matter of:	)	Case No 20-RC-145340
)	
OCEANIC TIME WARNER CABLE	)	CERTIFICATE OF SERVICE
LLC,)	
)	
Employer,)	
)	
and)	
)	
INTERNATIONAL BROTHERHOOD)	
OF ELECTRICAL WORKERS,)	
LOCAL 1186,)	
)	
Petitioner.	)	Hearing: April 24, 2015
<hr style="width:40%; margin-left:0"/>	)	Hearing Officer: Trent K. Kakuda

CERTIFICATE OF SERVICE

I hereby certify that on the date noted below, a true and correct copy of the foregoing was served on the following by electronic transmission on the date stated below.

Trent K. Kakuda	Trent.Kakuda@nlrb.gov
Hearing Officer	

Daniel Silverman	dan@silvermanlaborlaw.com
Ronald Leong	rleong@wik.com
Attorneys for Oceanic Time Warner Cable LLC	

Dated: Honolulu, Hawaii, May 1, 2015.

/s/ SEAN KIM
Attorney for the Petitioner